INDEX

CITATIONS

540599—60——1

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 319

WALTER SCHILLING, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 12–13) is reported at 268 F. 2d 584. The administrative decisions of the Hearing Examiner and of the Director, Office of Alien Property, are reprinted in Appendix B, *infra*, pp. 37–50.

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1959 (R. 14). The petition for a writ of certiorari was filed on August 18, 1959, and was granted by this Court on October 26, 1959 (R. 15; 361 U.S. 784). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Petitioner's brief sets out most of the relevant statutory provisions. In addition, we reprint (Appendix A, *infra*, pp. 33–36) Section 9(f) of the Trading with the Enemy Act, the relevant parts of Sections 32(d), 32(f) and 39 of that Act, and the complete text of Section 12 of the Administrative Procedure Act (5 U.S.C. 1011).

QUESTION PRESENTED

Whether a district court has jurisdiction under the Administrative Procedure Act, the Federal Declaratory Judgment Act, or any other provision of law to review an administrative decision under Section 32 of the Trading with the Enemy Act which holds that an applicant is not a persecuted person eligible for the return of vested property under the provisions of Section 32(a)(2)(D).

STATEMENT

On July 26, 1948, petitioner filed a Notice of Claim with the Alien Property Custodian seeking a return of vested property under Section 32(a)(2)(D) (Pet. Br. 44–45) of the Trading with the Enemy Act. Although that Section states a general prohibition against the return of vested property to German citizens present in Germany after December 7, 1941, it contains a proviso (enacted in August 1946) which declares that "return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7,

1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation."[1]

The allegations upon which petitioner relied in making his claim may be summarized briefly as follows (see petitioner's District Court complaint, R. 3–5). Petitioner, at all relevant times, was a resident and citizen of Germany. Property which he owned or in which he had an interest was vested under the Trading with the Enemy Act by the respondent's predecessors in 1942, 1947 and 1948. During the Hitler regime in Germany, petitioner was denied admission to the practice of law. This was a substantial deprivation of his rights as a German citizen, imposed upon him because he was a known opponent of Nazism and considered politically unreliable. Anti-Nazis or non-Nazis, such as petitioner, were recognized and treated as members of a political group by Nazi authorities and under Nazi laws.

The claim was heard in due course by a Hearing Examiner, who recommended that it be allowed.[2] The

[1] A further requirement, applicable to all returns under Section 32, is that it be determined to be "in the interest of the United States." Section 32(a)(5).

[2] The decisions of the Hearing Examiners and of the Director on claims are available for inspection and for distribution. *Regulations of the Office of Alien Property*, 8 C.F.R. (1958 Revision), § 503.1.

Under the Regulations, the rules of evidence are not controlling (§ 502.13(i)) and claims are frequently submitted entirely on documentary evidence. In this case, according to the Examiner, the record consisted of documentary evidence, except for one witness called by claimant to testify as to conditions in Germany (Appendix B, *infra*, pp. 37–38).

Examiner found (Appendix B, *infra*, p. 39) that petitioner had trained for the legal profession; that he was advised that he could not hope for a career in that profession unless he became a member of the Nazi Party;[3] that he nevertheless refused to support the Nazi movement and that he rejected an invitation to join the Party; and that between 1940 and the end of hostilities, knowing that he would not be licensed to practice law, he worked, first, as a legal assistant or clerk in a law firm and, later, as an employee of an industrial firm, serving in a legal capacity. The Examiner concluded (Appendix B, *infra*, pp. 41–45) that petitioner's exclusion from the general practice of law was a substantial deprivation of his rights as a German citizen and that the discrimination which he suffered was directed against a political group composed of those who declined an invitation to join the Nazi Party.

The Director rejected the Examiner's recommendation and disallowed the claim (Appendix B, *infra*, pp. 45–50). He agreed with the Examiner that those who were not members of the Nazi Party were, as a practical matter, excluded from entry into the practice of law. It was his conclusion, however, that Section 32(a)(2)(D) was purposefully restricted by Congress to persecuted minorities. He held further that Non-Nazis and Anti-Nazis, as such, did not constitute a political group within the meaning of that Section.

---

[3] According to the Examiner, Party membership was limited to about ten percent of the German population (Appendix B, *infra*, p. 42).

The Attorney General determined not to review the decision of the Director and that decision, as an administrative matter, became final (R. 7).

Petitioner, on July 8, 1958, filed a complaint in the District Court for "judicial review of federal agency action" (R. 3), reciting the facts summarized above, and alleging that the Director's decision was illegal and arbitrary.

Respondent moved to dismiss the complaint for want of jurisdiction (R. 8). The District Court denied the motion by an order dated October 8, 1958 (R. 9). The findings necessary for an interlocutory appeal under Section 1292(b) of Title 28, U.S.C., having been made in that order, and the Court of Appeals having granted leave to appeal, an appeal was taken from the order denying the motion to dismiss (R. 9, 11). On May 21, 1959, the Court of Appeals reversed and remanded the cause with directions to dismiss for want of jurisdiction (R. 14).

SUMMARY OF ARGUMENT

I

Petitioner is a resident and national of Germany and hence an "enemy" under the Trading with the Enemy Act ineligible to sue for the recovery of property vested under that Act (Section 9(a)). It is the general scheme of the statute that seized enemy property is to be used to satisfy the claims of American nationals who suffered from the wartime acts of the Axis powers and that the former owners of vested

property shall look to their own governments for compensation. By treaty, Germany has recognized its duty to compensate German nationals whose property was seized by the United States during World War II.

Section 32, under which petitioner filed an administrative claim, is an act of grace whereby Congress provided (in 1946) that certain classes of technical enemies, *e.g.*, persecuted minorities treated as virtual outlaws by the Hitler regime, might secure a return from the United States if the President or his delegate determined that such a dispensation was in this country's interest. In the instant case, the Director of the Office of Alien Property determined that petitioner did not fall within the categories of persons eligible for such a return. The sole question is whether his determination is judicially reviewable.

The background and history of Section 32—a measure which was considered at great length by the Congress—establish that Congress was fully aware that the Trading with the Enemy Act does not permit suits by enemies. The history establishes further that Congress, in enacting Section 32, chose to confine discretionary returns to technical enemies to the exclusive direction, control and authority of the Executive Branch. Both the proponents and opponents of the measure were fully agreed on one point: that it did not allow for judicial review. Moreover, the same Congress which enacted Section 32 did make explicit provision for review in adopting certain other amendments to the Act.

The language of the Section compels the same conclusion. Apart from the fact that the President must determine that return is "in the interest of the United States," it is significant that the Section, throughout its length, is permissive in terms. The Executive "may" return or he "may" return in part; there is no direction that he shall. In deciding whether to do so, he is free to adopt whatever procedures he sees fit. And, most significant of all, if the Executive decides to make a return and publishes notice of intention to do so, he may nonetheless change his mind and revoke his notice, in which event, the statute declares, there shall be "no right of action" to compel a return.

We deal here, in short, with a statute which imposes no legal obligation upon the Government. The provision is an act of grace adopted by Congress in relation to the dispensation of funds over which Congress has plenary control. The potential benefits run to persons who are enemies and who have no rights in the subject matter, constitutional or otherwise. The administration and control of the scheme of dispensation have been entrusted, in all particulars, to the Executive. As said by this Court in relation to another statute, "Congress intended [the Executive] to act for it and to construe the meaning of the words used * * * and to give effect to his interpretation without the intervention of the courts." *Work* v. *Rives*, 267 U.S. 175, 182.

II

Petitioner does not, indeed, contend that the Trading with the Enemy Act provides him a judicial

remedy. He urges, rather, that authority to review the executive decision can (or should) be found in the Administrative Procedure Act, the Declaratory Judgment Act, or in 28 U.S.C. 1331 ("federal question" jurisdiction). If we are correct in our view of the statute and its history (Point I), these contentions must fail.

The Administrative Procedure Act is inapplicable because the subject matter is one committed to agency discretion. There is also a further barrier: the Administrative Procedure Act does not apply where there is another statute which precludes review.

Section 7(c) of the Trading with the Enemy Act explicitly states that the "sole relief and remedy of any person having any claim to any * * * property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act * * *." And Section 9, which extends a right of action only to those who are non-enemies, declares that "[e]xcept as herein provided, the * * * property * * * transferred * * * to the Alien Property Custodian, shall not be * * * subject to any order or decree of any court." Congress was aware, when it later enacted Section 32, that provisions of the original Act (which it left unchanged) specifically forbade suits by enemies. Nonetheless, it consciously failed to provide for judicial review of actions taken pursuant to Section 32. There is thus no basis, as the court below has consistently held, for implying an exception to the "sole relief and remedy" language of the Trading with the Enemy Act. Nor is there any constitu-

tional reason for straining to do so. The remedy under Section 9(a) is fully adequate, as this Court has stated, to protect all rights which are within the protection of the Fifth Amendment.

The same considerations apply to petitioner's efforts to find jurisdiction in the Declaratory Judgment Act and in 28 U.S.C. 1331. A declaratory judgment is a form of remedy and it, too, is excluded. Moreover, the Declaratory Judgment Act is not, in and of itself, a grant of jurisdiction; the availabilty of declaratory relief depends upon the existence of a justiciable right.

Similarly, under 28 U.S.C. 1331, the question whether petitioner has a justiciable right arising under the laws of the United States depends upon whether Congress has created one in the Trading with the Enemy Act. There was no compulsion to do so. "When the claims created are against the United States, no remedy through the courts need be provided," *Stark* v. *Wickard*, 321 U.S. 288, 306. As this Court observed in dealing with return provisions of the Trading with the Enemy Act adopted after World War I, there can be no question that Congress was fully entitled to deal with the subject of return to enemies "as a matter of grace," *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 124.

The cases upon which petitioner relies—cases in which the Court has found authority to review agency action in the absence of explicit provision therefor—are cases arising under other statutes or under claim of constitutional right. They are unpersuasive here. What is decisive in the present situation is that the

Executive has acted under an authority vested explicitly in him and that his action has been taken pursuant to a scheme of grace; his denial of petitioner's claim involves no invasion of any protected right, denial of employment opportunities, or infliction of injury to reputation or other interest.

ARGUMENT

I

CONGRESS, IN ENACTING SECTION 32, INTENDED TO GRANT ONLY AN ADMINISTRATIVE AND DISCRETIONARY REMEDY; IT CREATED NO RIGHT OF ACTION

Petitioner in this case is a resident and national of Germany and hence admittedly ineligible (see Pet. Br. 37) to sue for the recovery of vested property under Section 9(a), the Section which provides plenary relief to non-enemies whose property has been erroneously or invalidly seized under the Trading with the Enemy Act.[4] Under the scheme of that Act, property which is not returned is to be covered into a War Claims Fund and used to satisfy the claims of American nationals who suffered injury from the wartime acts of Germany and Japan. Section 39, Appendix A, *infra*, pp. 34–35.[5] Individual

[4] Section 9(a) (Pet. Br. 42) is available to any person "not an enemy or ally of enemy." "Enemy" is defined in Section 2 (Pet. Br. 41) to include any person resident in the territory of an enemy country. See, generally, *Clark* v. *Uebersee-Finanz-Korp.*, 332 U.S. 480. Petitioner's enemy status is unaltered by the termination of hostilities. Joint Resolution of October 19, 1951, 65 Stat. 451. Cf. *Swiss Ins. Co.* v. *Miller*, 267 U.S. 42.

[5] Enemy property is initially subject to the payment of the enemies' creditors. See Section 34, 50 U.S.C. App. 34, relating to so-called debt claims.

enemies whose property has been taken are to look to their own Governments for redress. Germany has solemnly recognized by treaty obligation its duty to compensate the former German owners whose property has been seized by the United States pursuant to the Trading with the Enemy Act.[6]

Petitioner claims, however, that he is entitled, under the provisions of Section 32(a)(2)(D) of the Act, (1) to an administrative determination that he is a person eligible under that Section for the return of vested property and (2) to judicial review of an administrative decision holding him ineligible.

Section 32, as we shall point out, is an act of grace which provides that the Executive, in his discretion, may make returns to certain technical enemies, *i.e.*, persons barred from right of recovery, when he concludes that such a course is "in the interest of the United States." The important point, for present purposes, is that Section 32 created no justiciable rights and that Congress consciously and deliberately withheld judicial remedies thereunder. Indeed, even though the Executive has decided to make a return under Section 32 and has published notice of his intention to do so, he may revoke, in which event such

---

[6] Convention on the Settlement of Matters Arising out of the War and the Occupation (Bonn Convention), May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954), 6 U.S.T. 5652, 5670, T.I.A.S. 3425. See discussion in *Tag* v. *Rogers*, 267 F. 2d 664, 668 (C.A.D.C.).

revocation "shall confer no right of action upon any person to compel the return" (Section 32(f)).

A. *The Legislative History of Section 32:*

The legislative history of Section 32 clearly discloses that the Congress intended, in Section 32, to provide an administrative and discretionary remedy which was not to be subject to any form of judicial review. The origin of the Section is found in H.R. 4840, which was introduced in the House (78th Congress, 2d Session) at the instance of the Attorney General and the Alien Property Custodian. The bill contemplated a complete overhaul of the Trading with the Enemy Act as to returns, payment of debt claims, and administrative matters growing out of World War II vestings. Section 32 of that bill was designed primarily to make possible the return of vested property to so-called technical enemies, who were not eligible to file claims or sue under Section 9(a).[1] Section 32(a), couched in terms similar to those of the present Section 32, provided for the return of property to such persons whenever the Executive was of the opinion that such return "would not be contrary to the interest of the United States." In a joint letter to the Speaker of the House (Hearing before the House Committee on the Judiciary (Subcommittee 1) on H.R. 4840, 78th Cong., 2d Sess., p. 11), the Attorney General and the Custodian stated that the proposed Section 32(a) "provides an administrative method for the return of property in particu-

[1] Among those barred by Section 9 were the residents of countries occupied by the enemy during the war. See *Guessefeldt* v. *McGrath*, 342 U.S. 308, 314–315.

lar cases without judicial proceedings."[8] The session expired before H.R. 4840 was reported out of Committee.

Comparable provisions to those of Section 32(a) of H.R. 4840 were introduced at the next session of Congress as H.R. 3750, which became Section 32 of the Act. The scheme of administrative returns without judicial review was retained. The non-availability of judicial review was clearly expressed at the Hearings on H.R. 3750 by Mr. Markham, the then Alien Property Custodian:

> I want to be sure I make this clear. Supposing a person applies to the Custodian for the return of a property, and for reasons that I deem appropriate under the bill I refuse to return the property. Now, we will say that this person would have to be a technical enemy, a Frenchman. He has no right to compel me to return it under this bill. [Hearings before the House Committee on the Judiciary (Subcommittee 1) on H.R. 3750, 79th Cong., 1st Sess., p. 14.]

A like understanding was expressed by opponents of the bill. Thus Mr. Charles R. Carroll, representing the National Foreign Trade Council, was asked respecting the administrative discretion to return under Section 32: "Is there any judicial review of that very question?" He replied: "On specific

[8] Subsection (b) contained provisions for judicial relief by way of an independent suit for a return comparable to that provided in Section 9(a), or by way of a suit for just compensation. There was no provision for judicial review of the administrative determinations under subsection (a).

returns, no, sir." Hearings before the Senate Subcommittee on the Judiciary on S. 2378 and S. 2039, 79th Cong., 2d Sess., p. 59. See also Hearings before the House Committee on the Judiciary (Subcommittee 1) on H.R. 3750, 79th Cong., 1st Sess., pp. 11, 14, 34, 35, 37, 51, 52. Although the desirability of providing for judicial review was repeatedly urged before both committees of Congress by opponents of the bill, no change was made in the bill in this respect.

This refusal of Congress to provide for judicial review, although its lack had been repeatedly pointed out and discussed, is in sharp contrast to Congress's action in making explicit provision for review in other amendments to the Trading with the Enemy Act adopted at the same session and considered by the same committees. Thus, Section 20 of the Act, amended in the same bill which contained the new Section 32 (Public Law 322, 79th Cong., approved March 8, 1946; 60 Stat. 50), made explicit provision for judicial review of determinations of allowable counsel fees in return proceedings. See House Report No. 1269, 79th Cong., 1st Sess., p. 18; Senate Report No. 920, 79th Cong., 2d Sess., p. 7.

As we have indicated (*supra*, pp. 2–3), Section 32 as enacted on March 8, 1946, provided that the President was *not* authorized to return vested property to a German citizen, such as the petitioner, who was present in Germany at any time between that date and December 7, 1941. The Congress, some five months later, amended the section to grant the Executive authority to make additional returns. This amendment resulted mainly from the representations made by the American Jewish Congress and the American Federation of

Jews from Central Europe that it was unjust to deny a return of their American assets to refugees who had been stripped of their German properties in the course of a persecution directed against their race and their religion. See, Hearings before the House Committee on the Judiciary (Subcommittee 1), on H.R. 5089, 79th Cong., 2d Sess., pp. 81–86; Hearings before a Subcommittee of the Senate Committee on the Judiciary, 79th Cong., 2d Sess., on S. 2378 and S. 2039, pp. 7–8, 10–11, 15–27.

S. 2039 (the "Mead bill") proposed to amend subsection (D) of Section 32(a)(2) by exempting from the prohibition on returns "a person who was a victim of religious or racial persecution in the country of his origin or residence." Objection was made to the proposed amendment on the ground that its language was so broad as to make administration difficult. It was pointed out that there were no limiting dates and that it might be construed to cover instances of individual vengeance as well as persecution by governmental action or action under color of law. See Senate Hearings on S. 2378 and S. 2039 (*supra*), pp. 9–10. As a result, the Senate accepted a compromise which had been recommended by the House Committee and which was set out in S. 2378. This compromise now appears as the first proviso of Section 32(a)(2)(D); it broadens the authority of the Executive[9] to include returns to persons "who, as a consequence of any law, decree,

[9] By Executive Order No. 9725, May 16, 1946 (11 F.R. 5381) the President delegated to the Alien Property Custodian the administration of Section 32. By Executive Order No. 9788, October 14, 1946, the functions of the Custodian were transferred to the Attorney General (11 F.R. 11981).

or regulation of the nation of which he was then a citizen or subject, discriminating against political,[10] racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation." [11]

The amendment was approved on August 8, 1946, as part of Public Law 671, 79th Cong., 60 Stat. 925. As part of the same bill, Congress added to the Act Section 33, a statute of limitations, and Section 34, which provided for administrative determinations of debt claims allowable out of the vested property. Section 34 made explicit provision for hearings on such claims and for judicial review of the determinations.

In connection with the addition to the Act of Section 33, Congressmen Sumners and Michener, the Chairman and the ranking member of the House Judiciary Committee, respectively, inserted in the record, with approval, a letter from the Custodian stating his understanding as to an amendment of that section that "this amendment is not to be regarded as imply-

[10] We have found no legislative history indicating what was intended by the term "political group." The only reference to the term is in House Report No. 2398, 79th Cong., 2d Sess., p. 19, and is to the effect that it was not contemplated that returns could be made to "members of groups or factions, such as the Iron Guard in Rumania, which were at one time proscribed and later restored to favor by Axis influence."

[11] The hearings and reports indicated that "full rights of citizenship" meant "the degree of civil rights which are normally enjoyed." Hearings before the Senate Subcommittee of the Committee on the Judiciary, 79th Cong., 2d Sess., on S. 2378 and S. 2039, p. 33; House Report No. 2398, 79th Cong., 2d Sess., pp. 18–19.

ing that there is judicial review under Section 32." 92 Cong. Rec. 10485–10486. And the committee reports expressly pointed out that judicial review was made available in respect of administrative determinations of debt claims under Section 34. House Report No. 1209, 79th Cong., 1st Sess., p. 7; House Report No. 2398, 79th Cong., 2d Sess., p. 13; Senate Report No. 920, 79th Cong., 2d Sess., p. 7; Senate Report No. 1839, 79th Cong., 2d Sess., pp. 7–8. The failure to make any provision for judicial review of determinations under Section 32, although the issue had been repeatedly raised, can be regarded only as clear proof that Congress intended Section 32, as originally enacted and as amended in August of 1946, to afford only a discretionary and administrative remedy, without right of resort to the courts.[12]

Petitioner's references to legislative history (Brief, pp. 18–21) include general statements of witnesses at hearings to the effect that Congress intended in Sections 32 and in 32(a)(2)(D) to "release" vested property to persecuted nationals of Germany and of statements in congressional reports as late as 1949, 1950, and 1951 describing, in the words of later com-

[12] Further confirmation of this intention is found in the contrast between the return legislation enacted after World War I with the provisions of Section 32. After World War I Congress broadened the return provisions of the Act to allow certain foreign enemies to recover seized property, but at that time Congress created an explicit right in the enemies to sue. See Sections 9(b) and 9(c). Those World War I provisions have been held not to apply to World War II vestings. *Feyerabend* v. *McGrath*, 189 F. 2d 694 (C.A. D.C.). Cf. *Markham* v. *Cabell*, 326 U.S. 404.

mittees, the provisions and effect of Section 32 as those committees understood them."[13]

Statements made in congressional reports subsequent to the enactment of a statute have little significance as aids to interpretation in comparison with expressions of contemporaneous intent. *Rainwater v. United States*, 356 U.S. 590, 593; *Fogarty v. United States*, 340 U.S. 8, 13–14. The important thing is the meaning Congress intended to express in 1946. And it does not follow from broad statements of intention to relieve "victims of Axis oppression", or from statements that "enemy citizens who had been persecuted for political, racial or religious reasons could have their former property returned to them," (Pet. Br. 19–22) that Congress intended to authorize the return of vested property to every former owner who has been persecuted in any way or in any degree. Had that been the intention of Congress it would have enacted the "Mead bill" (S. 2039) which provided relief in general terms for any "person who was a

[13] Respectively, Senate Report No. 784, 81st Cong., 1st Sess. (1949); House Report No. 2338, 81st Cong., 2d Sess. (1950); Senate Report No. 600, 82d Cong., 1st Sess. (1951). These reports dealt with proposed legislation which was eventually enacted in 1954 (68 Stat. 767) authorizing the President to designate "successor organizations" to which returns could be made of property the former owner of which was deceased and who left no surviving successors in interest eligible for return. Property so returned was to be used for the rehabilitation of victims of persecution. See Section 32(h) of the Act.

Petitioner does not allude to the fact that proposals to make determinations under Section 32 judicially reviewable were offered in subsequent Congresses, but failed of enactment, S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess.

victim of religious or racial persecution" (see *supra*, p. 15)."

B. *The Statutory Terms:*

In all of its pertinent provisions, Section 32 is permissive, not mandatory. Thus, it does not require that the President or his delegate return any property at all; the language is that he "may" return. More than that, he "may" make a return only if he concludes that to do so is "in the interest of the United States." He is also authorized by the language of the Section to make only a partial or a limited return. Section 32(d) (Appendix A, *infra*, pp. 33–34). Should he decide that all the conditions are satisfied and direct a return, he may nonetheless change his mind and revoke his published notice of intention to return—in which event, there shall be *"no right of action"* to compel a return (Section 32(f) (Appendix A, *infra*, p. 34).

Not only is the discretion as to the making of returns broad; that as to procedure is equally so. Section 32 does not prescribe any procedure, and it does not require a "hearing." Section 35 of the Act *authorizes* such hearings "as may be deemed necessary," but the hearings held under Section 32 are not "required by statute" (see, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49–50), and, in practice, the

[11] The detailed wording of the "persecution" provisions of Sections 32(a)(2)(C) and 32(a)(2)(D), as added August 8, 1946, is, of course, a far cry from the broad return authorization which petitioner suggests.

majority of claims, whether allowed or denied, are disposed of summarily under the Regulations.[15]

Nothing in the language of Section 32 justifies petitioner's conclusion (Br. 22) that there are two "stages" in the administrative process: first, a proceeding to determine eligibility; second, a decision whether return is in the interest of the United States. And, in practice, the Director has not infrequently disallowed a claim on grounds of "national interest" without deciding eligibility at all.[16]

On the face of the statute, and in the light of the legislative history, Section 32 is an example of the type of statute where Congress, recognizing an obligation, *though not a legal one,* has confided the entire administration of the statute to the Executive Branch. Congress, we submit, "intended [the Executive] to

---

[15] In the exercise of his discretion the Custodian has returned property to nationals of countries like France, Italy, and other allied nations without a hearing upon certification by the government concerned that the claimant did not collaborate with the enemy during the war. See *Annual Reports of the Office of Alien Property* for the fiscal years 1946 (p. 149), 1947 (p. 84), 1948 (pp. 7, 86–87), 1949 (pp. 5, 74), 1950 (p. 69).

In 1955, the Attorney General determined, in agreement with the Chairman of the Civil Service Commission, that the hearing and decision of claims under Section 32 would be conducted in accordance with the requirements of the Administrative Procedure Act (see Pet. Br. 16). Section 34 (debt claims) of the Trading with the Enemy Act has always been construed to require hearings and to be subject to the Administrative Procedure Act, so the hearing officers handling Section 34 claims had to be appointed and qualified under 5 U.S.C. 1010. Since the same examiners also consider Section 32 claims, it made for simplicity of procedure to follow the hearing requirements of the Administrative Procedure Act on both types of claims.

[16] Also, on occasion, claims are disallowed without deciding eligibility because the claimant has not established pre-vesting ownership.

act for it and to construe the meaning of the words used * * * and to give effect to his interpretation without the intervention of the courts." *Work* v. *Rives*, 267 U.S. 175, 182. Cf. *Switchmen's Union* v. *Board*, 320 U.S. 297, 300, 301; *Estep* v. *United States*, 327 U.S. 114, 120.

II

THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, THE DECLARATORY JUDGMENT ACT OR OTHER PROVISION OF LAW

A. Asserting that the Government, by moving to dismiss, has admitted allegations that the Director's decision was illegal and arbitrary (Pet. Br. 10), petitioner argues that the legal wrong is one which may be redressed under the Administrative Procedure Act.

Before turning to the claim that the Administrative Procedure Act confers jurisdiction to review, we note our disagreement with the suggestion that the Government has conceded that the administrative decision is an arbitrary one. Petitioner's complaint alleges the specific facts concerning petitioner's deprivation of rights in Germany and the grounds upon which the Director has acted (R. 6). These allegations are amplified and explained by the administrative decision. When a complaint, in addition to general and conclusory allegations, sets out the specific acts upon which the conclusions or characterizations are based, a motion to dismiss admits only the former.[17] The specific allegations control and qualify the general

[17] See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 401; *Straus* v. *Foxworth*, 231 U.S. 162, 168; *Pierce Oil Co.* v. *City of Hope*, 248 U.S. 498, 500.

ones.[18] Reading the complaint as a whole, it is apparent that petitioner's claim of arbitrariness means only that the Director did not accept the legal interpretation of Section 32(a)(2)(D) for which petitioner contends. The Director's decision, read against the language and background of the Section, is, in our view, a reasoned and a reasonable one. Although we do not brief the merits of the Director's holding inasmuch as the decision below turns solely on the issue of jurisdiction to review, we dispute any suggestion that it is evident or established that the Director has proceeded arbitrarily or in defiance of law.

Petitioner's argument that there is a "presumptive" remedy under the Administrative Procedure Act encounters two obstacles. Section 10 of the Administrative Procedure Act (Pet. Br. 46), dealing with judicial relief of agency action, begins with two exceptions: "*Except* so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." This case falls within both.

As we have argued above (Point I), Section 32 is in terms discretionary and the legislative history conclusively shows that this result was fully intended.

Moreover, the Trading with the Enemy Act precludes review except insofar as review is authorized by that Act. Section 7(c) of the statute (Pet. Br. 42) unambiguously states:

> The sole relief and remedy of any person having any claim to any * * * property * * *

[18] See *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 57; *Nortz* v. *United States*, 294 U.S. 317, 324.

> transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act * * *.

And Section 9(f) declares:

> Except as herein provided,[19] the * * * property * * * transferred * * * to the Alien Property Custodian, shall not be * * * subject to any order or decree of any court.

Reading these two sections of the original Act with Section 32, the result is plain. Non-enemies have a right to sue for recovery in the District Courts;[20] enemies can obtain returns, if at all, only as a matter of executive grace.[21]

There is no basis for petitioner's suggestion that Section 7(c) should be construed only to limit the remedies available to non-enemies. As this Court has said, the language is "all-inclusive," *Becker Co.* v. *Cummings*, 296 U.S. 74, 79. And it cannot be supposed that Congress was unaware, when it provided

---

[19] This refers to Section 9(a), suits by non-enemy claimants for return. Section 9 when originally enacted in 1917 was not divided into subsections, and what is now 9(a) was the first sentence of the section, and what is now 9(f) was the next to the last sentence.

[20] Section 9(a) provides for a trial *de novo*, not for judicial review of the administrative denial of a claim. *Stoehr* v. *Wallace*, 255 U.S. 239, 245–246. The claimant may file suit "forthwith" after filing his notice of claim (*Central Trust Co.* v. *Garvan*, 254 U.S. 559, 567), or "as promptly after the seizure as he chooses" (*Stoehr* v. *Wallace*, *supra*, at 243, 246), and he is not required to exhaust his administrative remedy. *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S.D.N.Y.); *Duisberg* v. *Crowley*, 54 F. Supp. 365 (D.N.J.).

[21] Cases like *Homovich* v. *Chapman*, 191 F. 2d 761 (C.A. D.C.), cited by petitioner (pp. 23–24), are distinguishable. Under numerous statutes, the agency has *some* discretion, but the matter is not *committed*.

administrative relief for certain technical enemies in 1946, that the Act in terms forbade institution of suit by enemies. As emphasized earlier, both the proponents and the opponents of Section 32 repeatedly pointed out that the new section made no provision for judicial proceedings and that judicial remedies were available only to non-enemies.[22]

This view has been repeatedly expressed in a series of unanimous decisions by the court below. In *McGrath* v. *Zander*, 177 F. 2d 649 (C.A. D.C.), Judge Proctor observed (p. 651) that relief under the Administrative Procedure Act was precluded by the "discretionary nature of the action granted the Custodian" and by the "sole relief and remedy" provision of Section 7(c). In *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.), Judge Prettyman repeated (p. 37) the proposition that "Section 32 is discretionary and that judicial review of denial of a claim under Section 32 is precluded by the provisions of Section 7(c) of the Act." In *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.

[22] Petitioner argues (Pet. Br. 25–26) that Section 32(a)(2)(D) is legislation "subsequent" to the Administrative Procedure Act (the amendment to the former was approved August 8, 1946, and the latter on June 11, 1946), and so on the authority of Section 12 of the Administrative Procedure Act there must be judicial review unless "expressly" precluded. Petitioner ignores the fact that Section 12 (5 U.S.C. 1011), enacted in June 1946, provides that: "This Act shall take effect three months after its approval," and also provides that "Nothing in this Act shall be held * * * to limit or repeal additional requirements imposed by statute or otherwise recognized by law" (such as the provisions of Section 7(c) and the requirement of Section 9(a) that suit may be brought only by a "person not an enemy"). See *Securities and Exchange Commission* v. *Morgan, Lewis, & Bockius*, 209 F. 2d 44, 49 (C.A. 3); *Gostoffich* v. *Valore*, 257 F. 2d 144, 145 (C.A. 3).

D.C.), Judge Fahy stated (p. 804) that since "jurisdiction is not found * * * in the Act * * * we may not search elsewhere for it, for Section 7(c) of the Act excludes any other remedy to a person having any claim to money or other property paid over to the Alien Property Custodian or seized by him." In *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.), Judge Washington declared (p. 459): "Nor does this court have jurisdiction under Section 32(a) to grant relief, either in a suit in equity or by judicial review of the Section 32 administrative proceedings, because by virtue of Section 7(c) the exclusive judicial remedy under the Act is to be sought under Section 9(a)."[23]

We emphasize, finally, that, in the context of the Trading with the Enemy Act, there can be no occasion for straining to imply a right of action. The remedy in Section 9(a) is fully adequate to protect all rights which are within the protection of the Fifth Amendment. *Stoehr* v. *Wallace*, 255 U.S. 239, 246; *Becker Co.* v. *Cummings*, 296 U.S. 74, 79; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 484. Enemy claimants, as defined in the Trading with the Enemy Act, are not within the due process or just compensation clauses. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120–121. And see *Miller* v. *United States*, 11

[23] Although Section 32 was involved in the *Legerlotz* case, the main point of the decision was that the *allowance* of a claim under Section 32, and a subsequent amendment of a return order under that Section, did not toll the period of limitations provided for suits under Section 9(a). A petition for a writ of certiorari was granted in *Legerlotz*, 361 U.S. 808. An administrative settlement has been reached, however, and the parties are stipulating for dismissal of the writ.

Wall. 268, 305–306. "An enemy or an ally of enemy is positively and intentionally denied relief, not only in 9(a) but elsewhere, because his property can be forfeited." *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 797 (C.A. 2), affirmed, *sub nom. Silesian-American Corporation* v. *Clark*, 332 U.S. 469, 475.[24]

B. What has been said above—our arguments as to the discretionary character of relief under Section 32 and as to the exclusiveness of the remedies provided within the framework of the Trading with the Enemy Act—is likewise responsive to petitioner's efforts to find jurisdiction in the Declaratory Judgment Act and in 28 U.S.C. 1331 ("federal question" jurisdiction of the District Courts).

A declaratory judgment is a form of remedy, and the prohibitions of the Trading with the Enemy Act against suit by enemies and against non-statutory remedies (Sections 7(c) and 9(f)) apply to that form of remedy no less than to others. Moreover, the Declaratory Judgment Act is not, in and of itself, a grant

[24] In an early and leading case under the Trading with the Enemy Act, Judge Learned Hand pointed out that enemy claimants were "expressly forbidden by valid enactment from bringing any suit in any court," and that the Act provided "no remedies whatever, except under Section 9." *Kahn* v. *Garcan*, 263 Fed. 909, 913, 915 (S.D.N.Y.). For other expressions of the same view in the lower federal courts, see *Kuttroff* v. *Sutherland*, 66 F. 2d 500 (C.A. 2); *Becker Steel Co. of America* v. *Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604; *Berger* v. *Ruoff*, 195 F. 2d 775 (C.A. D.C.), certiorari denied, 343 U.S. 950; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *United States* v. *Sutherland*, 51 F. 2d 607 (C.A. D.C.), certiorari denied, 284 U.S. 667; *Koehler* v. *Clark*, 170 F. 2d 779, 780 (C.A. 9); *Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937.

of jurisdiction, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671; the availability of declaratory relief depends upon the existence of a justiciable right. One is thus thrown back to the question (Point I) whether Congress, by enacting Section 32, created such a right. Certainly, it was under no compulsion to do so. "When the claims created are against the United States, no remedy through the courts need be provided," *Stark* v. *Wickard*, 321 U.S. 288, 306. "All constitutional questions aside"—and none are present here—"it is for Congress to determine how the rights which it creates shall be enforced," *Switchmen's Union* v. *Board*, 320 U.S. 297, 301. And an intention to restrict a claimant's remedies to executive relief is not difficult to find "when the Congress is dealing with its own money," *id.*, p. 320 (dissenting opinion of Mr. Justice Reed).

Petitioner relies heavily upon a sentence in this Court's opinion in a deportation case, *McGrath* v. *Kristensen*, 340 U.S. 162, 169: "Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute may be determined by a declaratory judgment proceeding." We question whether petitioner's claim to be considered "eligible" under Section 32 raises an issue of "status." Petitioner's "status" is admittedly that of an "enemy." *Ex parte Kawato*, 317 U.S. 69, 71. The right to sue has been held not to amount to a "status" (*Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 215 F. 2d 300, 305 (C.A. 3), certiorari denied, 356 U.S. 957), and the same would seem to be true of a claim to relief under an isolated statutory provision.

In all events, we believe it plain that the Court in *Kristensen* did not announce a rule that the Declaratory Judgment Act overcomes provisions like Section 7(c) of the Trading with the Enemy Act, which expressly limits judicial relief to that "provided by the terms of this Act." Taken in context, the quoted sentence from the *Kristensen* opinion means simply this: Where the courts have jurisdiction under the Constitution or under a statute as judicially construed, to review administrative decisions, and those decisions depend upon "status," the question may be litigated in a suit for declaratory judgment.

Little need be added in relation to the original jurisdiction of District Courts under 28 U.S.C. 1331. Whether petitioner has a justiciable claim arising under the laws of the United States depends once again upon whether Congress, in providing by Section 32 for dispensation of monies over which it had control, purported to give a judicial remedy or whether it proposed to confine its scheme of dispensation to executive authority and discretion. As this Court stated in dealing with return provisions of the Trading with the Enemy Act adopted after World War I, there can be no question that Congress was fully entitled to deal with the subject "as a matter of grace." *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 124.

Petitioner deals with a variety of cases in which the courts have undertaken to review agency action in circumstances in which the availability of a judicial remedy was debatable. He places particular reliance upon this Court's decisions in *Leedom* v. *Kyne*, 358

U.S. 184, *Harmon* v. *Brucker*, 355 U.S. 579, *Perkins* v. *Elg*, 307 U.S. 325, and *McGrath* v. *Kristensen*, 340 U.S. 162.

We doubt that these cases are helpful in dealing with the ultimate problem which lies at the root of this case: the ascertainment of Congressional purpose as reflected in particular and detailed provisions of the Trading with the Enemy Act. "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied." *Switchmen's Union* v. *Board*, 320 U.S. 297, 301. The hazard of generalization is all the greater when one considers that each of the cases upon which petitioner relies raised a problem of a very different order from the one presented here.

Leedom v. *Kyne*, *supra*, involved the protected rights of certain employees adversely affected by a Labor Board order which, the Court concluded, had been entered in contravention of a "specific prohibition in the [National Labor Relations] Act" (358 U.S. at 188). There was accordingly no issue of Board discretion. The suit, moreover, was one concededly within the jurisdictional provisions of 28 U.S.C. 1337 "unless the review provisions of the National Labor Relations Act destroyed it" (*id.*, p. 187). Upon the basis of its examination of these review provisions, the Court concluded that the remedy had not been obliterated by statute.

Harmon v. *Brucker, supra,* also involved a protected right—the right to be secure in one's reputation. It did not involve, as the Court viewed the case, judicial review of an act of "administrative discretion" (355 U.S. at 582), but, rather, the question whether the Secretary of the Army had any statutory authority to predicate a military discharge upon factors other than military service. The Court concluded that the case fell under a traditional head of jurisdiction—jurisdiction to determine whether action affecting individual rights taken by an official subject to the District Court's jurisdiction is in excess of that official's statutory powers.[25]

Perkins v. *Elg, supra,* was a case in which the Court held that the complainant was entitled to a determination that she was an American citizen and to an injunction against the continued prosecution of deportation proceedings. The Court also held that the declaratory relief granted would preclude the Secretary of State from denying a passport to Miss Elg on the sole ground that she had lost her American citizenship. Miss Elg, as a citizen, was, of course, within the protection of the Fifth Amendment. Persons in that

[25] In the instant case, of course, there is no question of the Director's scope of authority. The question which the petitioner would have the District Court determine is the merits of the Director's decision in his case. If petitioner's position were accepted, it would apparently mean that a very large number of the Director's decisions might be challenged in the courts. Some hundreds of claims have been denied on the basis of the administrative interpretation of the "persecution" provisions of Sections 32(a)(2)(C) and 32(a)(2)(D). Between the enactment of Section 32 in 1946 and the end of fiscal year 1957, approximately 12,000 claims for the return of property were disposed of, the great majority under Section 32. See *Annual Report to the Office of Alien Property* (1957), p. 54.

category, the Court had long held, could challenge in the courts—at least upon habeas corpus—the lawfulness of an attempted deportation. See *Chin Yow* v. *United States*, 208 U.S. 8, 13; *Ng Fung Ho* v. *White*, 259 U.S. 276, 284. Obviously, the "right" asserted in the instant case is not to be equated with the constitutional right of a citizen to challenge the deprivation of liberty threatened by an impending and unauthorized deportation.

McGrath v. *Kristensen, supra,* involved application of the principle of *Perkins* v. *Elg* (see 340 U.S. at 169–170) to a resident alien (Kristensen) who claimed that the Attorney General had erroneously determined that he was ineligible for American citizenship (a determination of ineligibility which precluded Kristensen from securing executive relief from an order of deportation). As in the *Elg* case, the party seeking judicial relief was one who came within the protection of the Fifth Amendment.

The petitioner in the instant case has enemy status. As an enemy, he has no constitutional right to a return of vested property and he is concededly barred by statute (Section 9 of the Trading with the Enemy Act) from bringing an original District Court proceeding to compel return. His sole claim is that the Executive, in exercising the discretionary authority conferred by Section 32, has made an erroneous decision. If, however, as we contend and as the court below has consistently held, Section 32 constitutes a scheme of discretionary relief or of grace which Congress has confided solely and completely to executive administration and control, there is no jurisdictional

basis upon which petitioner's suit for review of agency action may be entertained. A holding that such was the congressional purpose—a holding which we believe fully warranted by the statutory language and history—would require an affirmance and it would involve no conflict whatever with any decision of this Court.

CONCLUSION

The decision below is correct and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
DALLAS S. TOWNSEND,
ROBERT KRAMER,
Assistant Attorneys General.
IRVING JAFFE,
GEORGE B. SEARLS,
VICTOR R. TAYLOR,
Attorneys.

FEBRUARY 1960.

APPENDIX A

Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 1 et seq.:

Section 9(f): Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

Section 32(d): Except as otherwise provided herein, and except to the extent that the President or such officer or agency as he may designate may otherwise determine, any person to whom return is made hereunder shall have all rights, privileges, and obligations in respect to the property or interest returned or the proceeds of which are returned which would have existed if the property or interest had not vested in the Alien Property Custodian, but no cause of action shall accrue to such person in respect of any deduction or retention of any part of the property or interest or proceeds by the Alien Property Custodian for the purpose of paying taxes, costs, or expenses, in connection with such property or interest or proceeds: *Provided*, That except as provided in subsections (b) and (c) of this section no person to whom a return is made pursuant to this section, nor the successor in interest of such person, shall acquire or have any claim or right of action against the United States or any department, establishment, or agency thereof, or corporation owned thereby, or against any person authorized or licensed by the United States,

founded upon the retention, sale, or other disposition, or use, during the period it was vested in the Alien Property Custodian, of the returned property, interest, or proceeds. * * *

* * * * *

Section 32(f): At least thirty days before making any return to any person other than a resident of the United States or a corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. * * *

* * * * *

Section 39:

(a) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.

(b) The Attorney General is authorized and directed, immediately upon the enactment of this subsection, to cover into the Treasury of the United States, for deposit into the War Claims Fund, from property vested in or transferred to him under this Act, such sums, not to exceed $75,000,000 in the aggregate, as may be necessary to satisfy unpaid awards heretofore or hereafter made under the War Claims Act of 1948. There is authorized to be appropriated to the Attorney General such sums as may be necessary to replace the sums deposited by him pursuant to the foregoing sentence.

(c) The Attorney General is authorized and directed, immediately upon the enactment of this subsection, to cover into the Treasury of the United States, for deposit into the War Claims Fund, from property vested in or transferred to him under this Act, such sums, not to exceed $3,750,000 in the aggregate, as may be necessary to satisfy unpaid awards heretofore or hereafter made under the War Claims Act of 1948, as amended. There is authorized to be appropriated to the Attorney General such sums as may be necessary to replace the sums deposited by him pursuant to this subsection.

* * * * *

Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1001 et seq.:

* * * * *

Section 12 (*5 U.S.C. 1011*): Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all au-

thority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

* * * * *

APPENDIX B

1. Recommended Decision of Harry R. Hinkes, Hearing Examiner

This is a proceeding for the return of vested property arising out of a claim filed pursuant to the Trading With the Enemy Act, as amended (50 U.S.C. Appx. 1–40) and conducted in accordance with the Rules of Procedure for Claims (8 CFR Part 502).

By Vesting Order No. 97, effective August 17, 1942, there were vested 82 shares of G. Bruning Tobacco Extract Co., Inc., as property of the estate of Mrs. G. Schilling, deceased, Bremen, Germany. By Vesting Order No. 10203, effective December 8, 1947, an obligation of one A. DeWitt Alexander and 570 shares of Pacific Lighting Corporation and accrued dividends were vested as property of Walter Schilling, claimant herein. By Vesting Order No. 12172, effective October 20, 1948, there was vested a certain debt of the Lynchburg Trust & Savings Bank, Lynchburg, Virginia, as property of the representatives and heirs of Mrs. G. Schilling, deceased. The vested property has been liquidated and the sum of over $68,000 represents claimant's share of the accounts. The claim is therefore an excepted claim within the meaning of section 502.2(h) of the Rules.

Pursuant to notice a hearing was held before me at which Richard P. Lott, Esq., represented the Chief of the Claims Section. Henry I. Fillman, Esq., of Katz & Sommerich, New York City, appeared for claimant. The only oral testimony was that of an attorney, M. Magdalena Schoch, an employee of this

Office, called as a witness by the claimant with respect to her personal knowledge of conditions in Germany. The rest of the record is documentary. Briefs were filed by both parties.

PROPOSED FINDINGS OF FACT

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910 and has always been a citizen and resident of Germany.

2. Claimant was the owner of the claimed property immediately prior to its vesting.

3. Claimant has never been a member of the Nazi Party or of any of its affiliates. On the contrary, he was an opponent of Nazism and known as such.

4. The Weimar Constitution of 1919 declared the equality of all citizens and made all German citizens eligible for public office in Germany "without distinction." These civil servants were "servants of the whole community, not of a party."

5. Under the Nazis, various laws were promulgated destroying the political freedom of public officials such as judges and making their appointment conditional upon their complete support of Nazism. This support could be expressed obviously by membership in the Party or in one of its affiliates. Political reliability was substituted for technical competence as the standard for civil service. Similar political tests were applied by government examiners to applicants seeking admission to the bar.

6. Only one political party was recognized by the German government under the Nazis, the Nazi Party. The reconstruction of dissolved, or the formation of new, political parties and even attempts at such activities were treated as treason. The Nazi administration regarded all who were not Nazis as ineligible for public office and the practice of law.

7. Claimant received a law degree from the University of Munich in 1934 and thereafter served as a Referendar (apprentice) in the courts of Bremen until 1939 when he became eligible to take his final examinations for admission to the legal profession.

8. Claimant knew that Nazi allegiance was a prerequisite for admission to the legal profession. Nevertheless he refused to support the Nazi movement, and rejected an invitation to become a member of the Nazi Party. As a consequence, he was not considered politically reliable.

9. Claimant took his final examinations in 1939 before the Chairman of the Examining Board, a prominent Nazi who would not pass any non-Nazi applicant. Claimant failed to pass. Claimant was informed by this chairman that claimant would find no position if claimant did not cooperate with the Nazis, because claimant had placed himself outside the community of the German people. Claimant, nevertheless, refused to change his position.

10. Claimant took a second entrance examination in 1940 before another Board Chairman and passed, but was told he could not hope for a career without party membership.

11. Claimant, knowing that he would not be licensed to practice law or be accepted for public service without party membership, obtained a job as a legal assistant or clerk in a Bremen law firm. In 1942 he went to work for a German industrial firm in a legal capacity where he continued until the end of the hostilities. Claimant then, for the first time, applied for admittance to the bar and was admitted to practice in Bremen as a lawyer.

PROPOSED CONCLUSIONS

The only issue in this proceeding is claimant's eligibility for a return of the claimed property under section 32 of the Act. Claimant, being a German citizen present in Germany throughout the war, must show that he failed to enjoy full rights of citizenship throughout the period of hostilities as a result of German laws discriminating against political, racial or religious groups. *In the Matter of Kashiro Maeda,* Title Claim No. 45628, Docket No. 1343, February 3, 1954.

In substance this claim proceeds upon the argument that claimant was denied admission to the practice of law, which was a substantial deprivation of his rights as a citizen; that this denial was due to his being non-Nazi (or anti-Nazi); that non-Nazis (or anti-Nazis) were recognized and treated as a political group by the Nazi authorities and under Nazi laws.

It is conceded by the Claims Section that Walter Schilling was not a member of the Party or any of its affiliates and that this status precluded his admission to the Bremen bar. It is argued, however, that the denial of this profession's practice was not a deprivation of a right of citizenship, but merely a denial of a privilege accorded members of the Nazi Party and, therefore, not a basis for a finding of eligibility under § 32(a)(2)(D). Cf. *In the Matter of Hermann Winter,* Title Claim No. 45960, Docket No. 56 T 37, decision of the Hearing Examiner dated May 24, 1956, adopted July 25, 1956. In that case, I held that a schoolteacher's dismissal for his non-membership in the Nazi Party was not a denial of a "right due generally qualified individuals" but merely a loss of privileges extended only to Party members and followers. In the instant claim, however, unlike the

Winter claim, the record makes it clear that, before the Nazis came into power, claimant had a *constitutional right* to be eligible for public office as a judge or licensed for the private practice of law regardless of political belief. The practice of law was no mere privilege. The Supreme Court of this country has ruled that the practice of law is not a matter of the State's grace; a person cannot be prevented from practicing except for valid reasons. *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 25 Law Week 4276 (1957). The purport of Articles 109, 118, 128, 129, *et al.* of the German Weimar Constitution is certainly similar. The Nazis destroyed that right as well as the right to be eligible for public office which was also made dependent upon the applicant's politics. This change in rights was a substantial loss to the German citizen. It is futile to argue that the Nazis created this condition by the enactment of a law. That law, by its destruction of political freedom and by its discrimination against nonconforming political beliefs is entitled to no more credit and support from us than are the notorious Nazi confiscatory decrees which discriminated against the German Jew, which decrees German courts have repudiated as "in contradiction with natural law," "immoral," "contrary to the fundamental principles of any lawful-state order." See *1 Sueddeutsche Juristen Zeitung col. 36* (1946); *2 Sueddeutsche Juristen Zeitung col. 257, 262* (1947); *8 Neue Juristische Wochenschrift 905* (1955) and discussion by Domke, *American-German Private International Law,* page 51 *et seq.* I cannot give Nazi legalism a morality and dignity which our courts usually accord the acts of another government. Any Nazi attempt, albeit by semblance of legislation, to diminish a constitutional right for invalid, discriminatory reasons should not

be upheld. See No. 296, 20 *Dept. State Bull.* 592 (1949); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (1954).

It is not sufficient, however, that claimant failed to enjoy full rights of citizenship pursuant to German law; to recover, claimant must show that the deprivation was pursuant to a law which discriminated against political, racial or religious groups. The totalitarian laws which impaired or destroyed the German constitutional rights were universal in scope. If the civil rights lost under the Nazis were to be regarded as the sole basis for eligibility residence in Nazi Germany would automatically qualify one for return. Cf. *Matter of Maeda, supra.* Congress intended but a cautious and limited program of returns for certain German *minorities.* See House Hearings on H.R. 5089, 79th Cong., 2d Sess. p. 81. A claimant's denial of civil rights, *discriminatorily,* was made the test and measure of eligibility.

To meet this issue, claimant argues that he and the others who *refused to support* the Nazi Party, unlike the bulk of the German population, were barred from private practice and public office. They were not just non-members of the Party. Such description would include perhaps 90% of the German population, since Party membership was limited to about one-tenth of the population. Department of State, *National Socialism,* page 45 (1943). This claim does not require a conclusion that mere non-members be deemed a persecuted political group. It suggests, however, that those who were expected and invited to be Nazi Party members but who refused to join be considered a political group. The membership of such a group was necessarily a very small minority of the population. The Nazis considered them "politically unreliable"

and regarded them as having segregated themselves from the rest of the community. The Nazis punished them as a group by disqualifying them from the legal profession. Unlike the loss of religious freedom which was experienced by all Germans, this deprivation was imposed upon a small minority of Germans, i.e., those who refused to support Nazism. Cf. *Matter of Hannah von Bredow,* Title Claim No. 42152, Docket No. 54 T 70, decision of the Hearing Examiner dated February 28, 1956. Claimant cites Mr. Peyton Ford, then Assistant to the Attorney General, who said in 1948, that the

> * * * groups who will benefit from the proposed amendment are the very groups who were regarded as enemies by the countries against which this country went to war * * *. In the imposition of persecution, they were treated as groups. (Sen. Rep. No. 784 on S. 2764, Appendix H, p. 12).

Claimant argues, therefore, that the Office should also treat them as a group. In this respect, claimant's position is not in disagreement with the definition of "group" in Webster's New International Dictionary, 2d Edition (1944):

> An assemblage of persons or things regarded as a unit because of their comparative segregation from others."

Since the group described by claimant was persecuted for its political behavior, claimant contends that this Office must regard it as a political group.

Claimant continues by suggesting a more liberal reading of § 32. He cites the testimony of the Deputy Director of this Office that

> * * * Under [section 32] * * * enemy citizens who had been persecuted for political, racial or religious *reasons* could have their

> former property returned to them. (Hearings, Administration of the Trading with the Enemy Act, 83rd Cong., 1st Sess., p. 104.) [Emphasis added.]

This language is repeated in the Final Report of the Subcommittee, page 6. Claimant points to the indisputable fact that he was persecuted for political *reasons*, even if such persecution was not directed against a political *group* and seeks to recover because the former was the real intent of the legislation. He cites *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284; *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253; *Rector, etc. of Holy Trinity Church* v. *United States*, 143 U.S. 457, *Markham* v. *Cabell*, 326 U.S. 404 and *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, to the effect that we are not always confined to a literal reading of a statute in construing it but may and should consider its object and purpose so as to effectuate rather than destroy its spirit and force which the legislature intended to enact.

The arguments of the claimant appear quite persuasive to me. The Chief of the Claims Section, however, contends that the Director has already considered these arguments and rejected them in the *Matter of Walter Lutz*, Title Claim No. 42142, Docket No. 55 T 75, decision of the Hearing Examiner dated September 30, 1955, pet. for rev. den. April 2, 1956. In that case, the Hearing Examiner found that a German physicist who was anti-Nazi was refused a civil service teaching position because he was not a member of the Party or of its affiliates. These circumstances alone were found insufficient to base a finding of a political group within the meaning of § 32. In the present case, claimant was offered Party membership. He declined although he knew he would be disqualified from practicing his profession. However "large and

amorphous" (to use the language in the *Matter of Mathilde Dietrich,* Title Claim No. 37849, Docket No. 1645, decision of the Director dated August 11, 1955) the group of non-Nazis and anti-Nazis were, the group of Germans who were offered the "privilege" of Party membership but who had the moral courage to reject the invitation even where such rejection labelled the rejector as "politically unreliable" must necessarily have been quite small. For that reason I do not believe the *Lutz* decision to be controlling.

I, therefore, conclude that:

1. Claimant, Walter Schilling, was resident within Germany on and after December 7, 1941.

2. Claimant is not entitled to the return of vested property under § 9 of the Act.

3. Claimant failed to enjoy full rights of German citizenship during the period of hostilities as a consequence of German laws, decrees or regulations discriminating against a political group, i.e., those who rejected an invitation to join the Nazi Party.

4. Claimant is eligible for the return of vested property under § 32 of the Act.

ACCORDINGLY, I recommend that Title Claim No. 37310, Docket No. 56 T 85 be allowed.

Harry R. Hinkes,
HARRY R. HINKES,
Hearing Examiner.

Dated: May 31, 1957.

---

2. DECISION OF DIRECTOR

This claim, which is for the return of the proceeds of vested property totalling approximately $68,000, is before me with a recommendation by the Hearing Examiner for allowance under section 32(a)(2)(D)

of the Trading with the Enemy Act, as amended (50 U.S.C. App. 32(a)(2)(D). A review of the record in this case compels me to reject the Examiner's recommendations and to disallow this claim.

The pertinent facts are as follows:

1. Claimant, Walter Schilling, was born in Bremen, Germany, in 1910. He has always been a citizen and resident of Germany.

2. The vested property from which the proceeds herein claimed were derived was owned by the claimant immediately prior to vesting.

3. Claimant was opposed to the principles of Nazism, and, in 1937, refused an invitation to join the Nazi party.

4. In 1934 claimant received a law degree from the University of Munich and thereafter served until 1939 (except for a one year period) as a "referendar" (young barrister attending the courts to qualify for admission to the bar) in the courts of Bremen. In 1939, claimant became eligible to take his final examination for admission to the legal profession. At that time the chairman of the examining board in Bremen was a prominent Nazi who would not pass any applicant who was not a member of the Nazi party or one of its affiliated organizations. The chairman refused to pass claimant, giving as his reason: "very poor performance professionally in the major task and two examination papers and in the oral examination. Politically completely passive." During the oral interview required of all candidates, the chairman informed the claimant that it would be useless for him to pass the examination since he had not joined a Nazi organization and thereby had placed himself outside the community of the German people.

5. After failing his final examination in 1939 claimant served an additional six months as a refer-

endar in the Bremen courts. He took the final examination for the second time in March 1940 before another chairman of the examining board who passed him. During the oral interview, however, this chairman told claimant that he could not hope for a career if he did not belong to the Nazi party or an affiliated organization.

6. An applicant for admission to the bar at the time claimant became eligible to apply for admission (and until after the cessation of hosilities) was, as a practical matter, required to be a member of the Nazi party or an affiliated organization. In view of this requirement, claimant, knowing that he would not be licensed without such membership, did not apply for permission to practice law after passing his examination. Instead he served as a legal clerk in a Bremen law firm until 1942 and in that year he went to work for a German industrial firm in a legal capacity where he was employed until the end of hostilities. Thereafter, claimant applied for admission to the bar and was licensed to practice law in 1946.

As a wartime citizen and resident of Germany, claimant is ineligible for the return of vested property unless he qualifies under the first proviso of section 32(a)(2)(D) of the Trading with the Enemy Act as

> an individual who, as a consequence of any law, decree, or regulation of [Germany] discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation.

The claimant argues that since the Weimar Constitution guaranteed all qualified applicants the right to a

license to practice law, the Nazi government's abrogation of that right was a substantial deprivation of the rights of German citizenship within the meaning of the above-quoted proviso. There is no doubt that claimant and his fellow German nationals who lived under the Nazi regime were deprived of most of the civil rights which had been granted by the Weimar Constitution. However, this general deprivation of rights cannot properly be held to afford the basis for relief under the first proviso of section 32(a)(2)(D). To construe the proviso in this way would produce the absurd result of making eligible for return every German claimant who was born prior to the advent of the Nazi regime. The language of the proviso is plainly not open to that construction and its clear intent is to make eligible for return only those German nationals who, as a result of laws or decrees discriminating against political, racial or religious groups, enjoyed rights of citizenship after December 7, 1941, substantially inferior to the *contemporary rights of German citizens generally*. See *Matter of Kashiro Maeda*, Title Claim 45628, Decision of Director, February 3, 1954, where I stated:

> * * * The Congress which enacted the law was well aware that our enemies in the war were dictatorships, in which the civil rights of the common citizen were few, and that life during the war years was hard for all but the favored classes. These circumstances were not made the tests of eligibility for return; if they had been, practically the entire population of the enemy countries would be eligible for return. * * * The return provided by the first proviso of Section 32(a)(2)(D) was an act of grace, limited to the persecuted minorities who suffered so grievously at the hands of enemy governments. * * * The tests prescribed by Congress for eligibility for return as a member

> of this limited class were definite, clear and strict. For an enemy national to qualify under the proviso it must be clear that, at all times after December 7, 1941, the *claimant was deprived of the rights of citizenship commonly enjoyed by other inhabitants of the country,* * * *." [Italics added.]

See also *Matter of Hermann Winter,* Title Claim 45960, Recommended Decision of Hearing Examiner adopted by Deputy Director January 25, 1956, which involved the claim of a German school teacher who was dismissed because of non-membership in a Nazi organization. In that decision it was stated:

> To be eligible under this section of the Act [section 32] a claimant must show that the civil rights of which he was deprived were generally available to the majority of German citizens. The loss of privileges available only to members of the Nazi party is not a denial of civil rights within the meaning of section 32(a)(2)(D).

Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political, racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group. *Matter of Mathilde Dietrich,* Claim 37849, Decision of Director, August 11, 1955; *Matter of Walter Lutz,* Claim 42142, Hearing Examiner's decision September 30, 1955, petition for review denied by Director April 2, 1956; *Matter of Heinrich Georg Lutz,* claim 42143, Hearing Examiner's recommended decision adopted by Director June 22, 1956. As was stated in the *Dietrich* claim, *supra,*

> neither the language nor the legislative history of section 32 indicates that Congress intended

> the phrase "political groups" to include a body of individuals so amorphous and so large as that described by the Hearing Examiner [German citizens present in Germany during the war, who were not Nazi sympathizers and who opposed Nazism].

In *Matter of Walter Lutz, supra*, a case which is indistinguishable from the instant matter, I disallowed the claim of an anti-Nazi physicist with two graduate degrees who was barred from the teaching profession in Germany because he was not a member of the Nazi party or one of its affiliated organizations of teachers. The disallowance was based on a holding that anti-Nazi graduate physicists so barred from the teaching profession did not constitute a political, racial or religious group within the purview of section 32(a)(2)(D) of the Act. See also *Matter of Hermann Winter, supra.*

Based upon the foregoing findings of fact and the record, I conclude that:

1. Claimant was a wartime resident of Germany and thus, as an enemy under section 2(a) of the Trading with the Enemy Act, as amended, is ineligible for the return of vested property under section 9(a); and

2. Claimant does not qualify for return under the standards of the first proviso of section 32(a)(2)(D).

ACCORDINGLY, Title Claim 37310 is hereby disallowed.

(Signed) Dallas S. Townsend,
DALLAS S. TOWNSEND,
Assistant Attorney General,
Director, Office of Alien Property.

APRIL 2, 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958

SUPREME COURT OF THE UNITED STATES

No. 319.—October Term, 1959.

Walter Schilling, Petitioner, v. William P. Rogers, Attorney General.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 20, 1960.]

Mr. Justice Harlan delivered the opinion of the Court.

Section 32 (a) of the Trading with the Enemy Act (added by 60 Stat. 50 as amended, 50 U. S. C. App. § 32 (a)) authorizes the return in certain circumstances of property vested by the United States during World War II. Under that provision:

> "The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine . . ."

that the following conditions are met: (1) the claimant was the owner of the property in question prior to its vesting, or is the legal representative or successor in interest of the owner;[1] (2) he was not a member of any of several

[1] § 32 (a) (1): "That the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner . . ."

excluded classes, summarized in the margin; [2] (3) the property was not used pursuant to a "cloaking" arrangement, whereby the interest of an ineligible person in the property was concealed; [3] (4) there is no danger of liability in respect of the property attaching to the Custodian under the renegotiation statutes; [4] and (5) "such return is in the interest of the United States." [5]

The particular provision involved in this case is paragraph 2 (D) of § 32 (a), which makes ineligible citizens of certain enemy countries who were present in those countries after the onset of hostilities, and its first proviso

[2] § 32 (a) (2) disqualifies: (A) the Governments of Germany, Japan, Bulgaria, Hungary, and Rumania; (B) corporations or associations organized under the laws of such nations; (C) persons voluntarily resident since Dec. 7, 1941, in any such nation, other than American citizens, certain diplomatic officers, or certain persecuted persons; (D) citizens of such nations, other than certain persecuted persons, who were present or engaged in business there between Dec. 7, 1941, and Mar. 8, 1946; and (E) certain foreign corporations or associations which, after Dec. 7, 1941, were controlled by persons falling within the above categories.

[3] § 32 (a) (3): "that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) of this section . . . ."

[4] § 32 (a) (4): "that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. §§ 89–96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor . . . ."

[5] § 32 (a) (5).

(added by 60 Stat. 930), which exempts from that ineligibility certain persons who were the victim of persecution.[6] The question for decision is whether the District Court had jurisdiction to review a determination of the Director, Office of Alien Property, sanctioned by the respondent Attorney General, holding this proviso inapplicable to the facts presented by the petitioner's claim.[7]

Petitioner, a national and resident of Germany at all material times, duly filed with the Attorney General a claim under the § 32 (a)(2)(D) proviso for the return of the proceeds of certain property vested by the respondent's predecessors in 1942, 1947, and 1948, asserting an interest therein of some $68,500. He alleged that throughout the relevant period he, as an "anti-Nazi," claimed to have been a discriminated-against political group, had been deprived of full rights of German citizenship, in that he had been denied admission to the practice of law. A Hearing Examiner recommended allowance of the claim, but his recommendation was rejected by the Director on

---

[6] § 32 (a)(2)(D) disqualifies: "an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . . ."

[7] On May 16, 1946, the President delegated his functions under § 32 (a) to the Alien Property Custodian. Exec. Order No. 9725, 11 Fed. Reg. 5381. On Oct. 15, 1946, the functions of the Custodian were transferred to the Attorney General. Exec. Order No. 9788, 11 Fed. Reg. 11981.

the ground that petitioner was ineligible for relief under the § 32 (a)(2)(D) proviso.* The Attorney General refused review. Petitioner then sued in the District Court to review the administrative determination, claiming it to have been arbitrary and illegal. The court denied the Government's motion to dismiss the complaint for want of jurisdiction. The Court of Appeals reversed, holding, in line with its own prior course of decisions, that judicial review of the administrative disposition was precluded by § 7 (c) of the Trading with the Enemy Act. 268 F. 2d 584. Because of the importance of the question in the proper administration of the Trading with the Enemy Act we brought the case here. 361 U. S. 874. For reasons given hereafter we affirm the judgment below.

Petitioner's principal reliance is upon § 10 of the Administrative Procedure Act which provides for judicial review of agency action "[e]xcept so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 60 Stat. 243, 5 U. S. C. § 1009. We find that both such limitations are applicable here.

Section 7 (c) of the Act provides:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of this Act . . . ."

---

* The Director stated the essence of his decision as follows: "Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political, racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group." (Citing past administrative decisions.)

We perceive no basis for petitioner's contention that § 7 (c) limits only the remedies available to nonenemies under § 9 (a), or for construing § 7 (c), passed in 1918, as not being applicable to § 32, passed in 1946. The language of the section is "all-inclusive," *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, and it speaks to the future as well as the past. See also *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 568.

The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in § 9 (a). That section, however, is applicable only to persons not enemies or allies of enemies as defined in the relevant statutes, and hence is not available to this petitioner, an enemy national.[2] While § 9 (c) also entitles certain classes of "enemies" enumerated in § 9 (b) similarly to sue in the courts to recover vested property whose return is authorized under § 9 (b), those sections apply only to World War I vestings. See *Feyerabend* v. *McGrath*, 189 F. 2d 694; cf. *Markham* v. *Cabell*, 326 U. S. 404. Although § 32 (a) broadened the categories of those having an enemy status who were eligible for the return of property vested during World War II, unlike § 9 (c) it contains no express provision for judicial relief in respect of such claims.

The question then is whether a right to such relief can fairly be implied, for we shall assume that if such be the

[2] Section 9 (a) authorizes "[a]ny person not an enemy or ally of enemy" (defined in § 2 of the Act, as supplemented by the First War Powers Act of 1941, 55 Stat. 838) to sue in equity for the return of vested property in which he claims an interest, either in the District Court for the District of Columbia or in the District Court of the district in which the claimant resides. 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a). As a German national and resident, petitioner is concededly an "enemy" under the statute.

case the requirements of § 7 (c) would be satisfied. The terms of § 32 and its legislative history speak strongly against any such implication. The absence in § 32 of any provision for judicial relief respecting "enemy" claims for the return of property vested during World War II stands in sharp contrast to the presence of such a provision in § 9 (c) with respect to certain enemy claims arising out of World War I vestings. The original version of what ultimately became § 32 did contain a provision for judicial relief comparable to that in § 9 (c), not applicable, however, to property of enemy national-residents, as well as a "sole relief and remedy" provision comparable to that in § 7 (c)—H. R. 4840, § 32 (b), (c), in Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives on H. R. 4840, 78th Cong., 2d Sess., pp. 1–2—but the subsequent draft of the bill, substantially in the form as finally enacted in March 1946 (60 Stat. 50), omitted both provisions. See H. R. 3750, in Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., pp. 1–2. While the legislative record contains no explanation for these omissions, the committee hearings on H. R. 3750 and those on subsequent amendments to the Act preclude the view that it was contemplated that persons having an enemy status, still less those who were nationals and residents of enemy countries, should have the right of recourse to the courts with respect to administrative denials of return claims.

Speaking to H. R. 3750 at the initial committee hearing, Mr. Markham, then Alien Property Custodian, stated:

> "I want to be sure I make this clear. Supposing a person applies to the Custodian for the return of a property, and for reasons that I deem appropriate under the bill I refuse to return the property. Now, we will say that this person would have to be a tech-

nical enemy, a Frenchman. He has no right to compel me to return it under this bill." Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 14; see also pp. 11, 15.

And when a few months later, in August 1946, various amendments to the statute were considered and the § 32 (a)(2)(D) proviso was added (60 Stat. 930), § 32 came under severe criticism because of the absence of provisions for judicial relief in respect of return claims by technical enemies. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., pp. 57–59, 61, 62–63. The affording of such relief to enemy nationals was, however, at no time suggested. Congress, nevertheless, permitted § 32 to stand without enacting provisions for such judicial relief,[10] and later proposed legislation of that character also failed of enactment. See S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess.[11]

[10] At the same time, however, Congress enacted other provisions relating to judicial remedies, § 33 providing a statute of limitations on the commencement of suits under § 9, and § 34 providing for judicial review of administrative determinations on debt claims allowable out of vested property (60 Stat. 925). In connection with the former section there was spread in Congressional Record, with the approval of the Chairman and Ranking Member of the House Judiciary Committee, a letter from the Custodian stating his understanding that "this amendment is not to be regarded as implying that there is judicial review under section 32." 92 Cong. Rec. 10486. Similarly, in connection with the enactment of § 32, a few months before, Congress had added to the Act § 20 providing for judicial review of administrative allowances of counsel fees in return proceedings before the Custodian, 60 Stat. 54. See also S. Rep. No. 920, 79th Cong., 2d Sess., p. 7.

[11] More particularly with reference to the § 32 (a)(2)(D) proviso, neither the Committee hearings preceding its enactment, see Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess.; cf. Hearings before Sub-

The conclusion which the history of § 32 impels is confirmed by the text of the section and other provisions of the Act. The absence of any provision for recourse to the courts in connection with § 32 (a) return claims contrasts strongly with the care that Congress took to provide for and limit judicial remedies with respect to other aspects of the section and other provisions of the Act. See, *e. g.*, §§ 32 (d), 32 (e), 32 (f),[12] 33, 34 (e), 34 (f), 34 (i). It is not of moment that these provisions concerned direct judicial relief, and not court review of denials of administrative relief. The point is that in this Act Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation. Beyond this, the permissive terms in which the § 32 return provisions are drawn (*ante*, p. ——) persuasively indicates that their administration was committed entirely to the discretionary judgment of the Executive branch "without the intervention of the courts." See *Work* v. *Rives*, 267 U. S. 175, 182.

---

committee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 5089, 79th Cong., 2d Sess., nor later Senate or House Reports referring to the proviso—see S. Rep. No. 784, 81st Cong., 1st Sess.; H. R. Rep. No. 2338, 81st Cong., 2d Sess.; S. Rep. No. 600, 82d Cong., 1st Sess.; Final Report of the Subcommittee on Administration of the Trading with the Enemy Act, Senate Committee on the Judiciary, pursuant to S. Res. 245, 82d Cong., 2d Sess., as amended by S. Res. 47, and S. Res. 120, 83d Cong., 1st Sess. —— contain any suggestion that judicial review was contemplated in connection with such claims.

[12] This section, which requires the Custodian to publish in the Federal Register a 30-day notice of his intention to return vested property to claimants other than residents of the United States or domestic corporations, provides that publication of such notice "shall confer no right of action upon any person to compel the return of any such property," and further that any such notice may be revoked by the Custodian by appropriate publication in the Federal Register.

Petitioner, however, relying on *McGrath* v. *Kristensen*, 340 U. S. 162, contends that even though he might not be entitled to judicial review of an adverse administrative determination on the *merits* of his claim, he is nonetheless entitled to such review on the issue of his *eligibility* under the § 32 (a)(2)(D) proviso, the only issue here involved. The *Kristensen* case, involving eligibility for suspension of deportation under § 244 of the Immigration and Nationality Act (66 Stat. 214, 8 U. S. C. § 1254), bears little resemblance to the situation involved here. See *Heikkila* v. *Barber*, 345 U. S. 229, 233; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301. The structure of § 32 (a) does not permit of any such distinction in this case. Compare H. R. 4840, 78th Cong., 2d Sess., § 32 (a). Indeed, it is not certain whether petitioner's theory of partial reviewability would apply only to the proviso with which he is concerned; to all of paragraph (2), but only to that paragraph; or to paragraphs (1), (3), and (4) as well (see pp. —, and Notes 1–4, *ante*). None of these alternatives is acceptable. As to the first and second, no reason appears why either of these categories should be singled out for special treatment, while the third would make reviewable determinations which involve factors with which only the Executive branch can satisfactorily deal. See, *e. g.*, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 4 (proof of pre-vesting ownership); Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 5089, 79th Cong., 2d Sess., p. 37 (proof of "cloaking" arrangements). Beyond that, we think the congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive was not designed to bestow rights on claimants, arising out of an assertedly too-narrow reading by the Executive of the

discretionary power given him. Rather we consider the specifications of paragraphs (1) through (4) as designed to provide guides for the Executive, thereby lessening the administrative burden of decision. See Hearings before Subcommittee No. 1 of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., p. 19.

We conclude that the Trading with the Enemy Act excludes a judicial remedy in this instance, and that because of this, as well as because of the discretionary character of the administrative action involved, the Administrative Procedure Act, by its own terms (*ante*, p. ——), is unavailing to the petitioner.[13]

Petitioner's other contentions may be dealt with shortly. It is urged that judicial review is in any event available because the complaint, whose allegations as the case comes here must be taken as true, alleges that the administrative action was arbitrary and capricious. However, such conclusory allegations may not be read in isolation from the complaint's factual allegations and the considerations set forth in the administrative decision upon which denial of this claim was based. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 401. So

[13] The fact that in a third-party suit affecting returned property, the courts must, in accordance with § 32 (e), determine, if relevant, the claimant's eligibility under the § 32 (a) (2) (D) proviso, does not militate against this conclusion. First, it is far from clear that in such circumstances the doctrine of primary jurisdiction would not call for a referral of that issue to the Attorney General. Cf. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Far East Conference* v. *United States*, 342 U. S. 570; *Maritime Board* v. *Isbrandtsen*, 356 U. S. 481, 496–498. Moreover, even if necessity compelled judicial determination in suits between private parties of the issue ordinarily disposed of under § 32 (a), we would not be justified, in the context of the other provisions of this statute, in inferring from that a congressional willingness to have Executive determinations reviewed in court.

read, it appears that the complaint should properly be taken as charging no more than that the administrative action was erroneous. This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here. Cf., *e. g., Accardi* v. *Shaughnessy*, 347 U. S. 260; *Leedom* v. *Kyne*, 358 U. S. 184.

Finally, petitioner's reliance on the Declaratory Judgment Act carries him no further. Section 7 (c) of the Trading with the Enemy Act embraces that form of judicial relief as well as others. Additionally, the Declaratory Judgment Act is not an independent source of federal jurisdiction, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 671; the availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

We conclude that the Court of Appeals correctly held that the District Court lacked jurisdiction over this action, and that its judgment must be

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 319.—October Term, 1959.

Walter Schilling, Petitioner, v. William P. Rogers, Attorney General.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 20, 1960.]

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join, dissenting.

This Court has gone far towards establishing the proposition that preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom* v. *Kyne*, 358 U. S. 184; *Harmon* v. *Brucker*, 355 U. S. 579; *Stark* v. *Wickard*, 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. Generalizations are dangerous, but with some safety one can say that judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.[1] To be sure, a clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose; though *Leedom* v. *Kyne*, *supra*, where I thought nonreviewability proved from the congressional purpose, shows that the Court is far from quick to draw such a conclusion. I cannot agree that the statute here gives any clear direction that this administrative determination that as a matter of law petitioner was ineligible for the exercise of discretionary relief under § 32 (a) should not be reviewable by the courts. Questions as to the scope of that review, of course, are not now before us; simply whether the power exists at all.

[1] See Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 432

Section 7 (c) of the Act states that the Act's remedies shall be "the sole relief and remedy" of claimants of vested property, and, to be sure, this language is "all-inclusive." *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79. Let us, then, take a close and fully-focused look at what those remedies include, and compare them with what petitioner seeks.

Section 9 (a) of the Act, under which petitioner of course makes no claim, provides a judicial remedy for those who are not enemies and not allies of enemies; they may sue in equity for the return of their property.[2] Sec-

[2] In pertinent part, § 9 (a) provides:

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to

tion 9 (c) gives the same remedy to certain classes of enemies.[3] But it is apparent from both these provisions that they contemplate an independent judicial remedy—a suit to return property; not an action to review certain determinations of administrative officers. There is not even a provision that application must be made for administrative relief before suit is brought. There simply is a requirement for the filing of a notice of claim, which the statute clearly distinguishes from making an application for an administrative return, the latter being optional. *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215; *Duisberg* v. *Crowley*, 54 F. Supp. 365. See *Stoehr* v. *Wallace*, 255 U. S. 239, 246. Even where the applicant chooses to seek an administrative return, suit may be instituted

---

which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . ." 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a).

[3] Section 9 (c) provides:

"(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof." As added, 41 Stat. 980, as amended, 50 U. S. C. App. § 9 (c).

The relevant classes of enemies are set forth in § 9 (b). Petitioner makes no claim under § 9 (c).

before the administrative action is completed. The administrative remedy and the judicial remedy are each completely independent of the other; Congress has made this clear even to the extent of putting an "and or" on the statute books. In no sense, then, can the independent judicial remedy of § 9 be said to be a judicial review of administrative action. It is independent of any administrative action's being taken. It requires the courts to make a plenary, *de novo* adjudication of all the controverted issues as they would in any lawsuit between citizens.

Section 32 (a), under which petitioner has applied for relief, on the other hand provides simply for an administrative remedy. That it does, of course, under § 7 (c) precludes the inference of any independent judicial remedy such as § 9 provides. But there is no reason why it should preclude the inference that administrative action taken under it should be subject to judicial review. The courts have developed many principles defining and limiting the quantum of judicial review that may be afforded administrative adjudication. This generally narrow character of judicial review, in contrast to an independent lawsuit directed at the same end as an administrative adjudication, points up the distinction between the independent action under § 9 and what is contended for here. In the latter, the courts cannot order the return of the property. They simply may say that the administrator cannot stand on the ground he gave for not returning it. See *Greene* v. *McElroy*, 360 U. S. 474, 510 (concurring opinion). The former is clearly precluded, but the latter hardly is. The approach to interpretation that cases like *Kyne*, *Harmon* and *Stark* symbolize should indicate that judicial review of the administrative action under § 32 (a) is available. Section 7 (c) is by no means offended by this since this construction recognizes that the sole remedy under § 32 (a) is administrative in nature, but attaches

to that administrative remedy the general attribute of administrative remedies in our system—judicial review.

The Court points to the legislative history of § 32 (a) as indicating a contrary conclusion. It says that a judicial remedy was originally provided for in early versions of the bill which added § 32 (a) to the statute, but that the final enactment omitted it. This would be very relevant if what had been originally contained in the bill had been a provision for judicial review of action taken under § 32 (a), such as what petitioner now contends is implicit. But it was not; it was rather a provision for an independent judicial remedy, patterned entirely in the style of § 9.[1] That it was omitted of course adds another proof that there can be no independent judicial action to get a return under § 32 (a); but it does not tell us that normal judicial review into administrative action under § 32 (a) is to be foreclosed. Mr. Markham's remarks, quoted by the Court, are of course explicable on the ground that there was no counterpart of § 9's provision for an independent lawsuit in § 32 (a). In fact, they were spoken in response

[1] In fact, the independent judicial remedy was not even put *in pari materia* with the administrative remedy under § 32 (a). It simply provided:

"After filing a claim with the Alien Property Custodian pursuant to subsection (a) hereof, a claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Custodian shall be made a party defendant), to establish that he is not a foreign country or national thereof as defined pursuant to subsection (b) of section 5 hereof, and to establish the interest, right, or title claimed. The claimant shall obtain a judgment or decree ordering the return to him of the interest, right, or title to which the court shall determine he is entitled, but only if the court shall adjudicate that he is not a foreign country or national thereof. . . ." § 32 (b), H. R. 4840, in Hearing before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 4840, 78th Cong., 2d Sess., pp. 1–2.

to a question whether "the individual whose property has been taken or affected can appeal to the courts of the land to have his equity determined?" Hearing before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 3750, 77th Cong., 1st Sess., p. 13. The question is a good description of the functions of courts under § 9. It does not describe the functions of courts exercising a review function of administrative action under § 32 (a). The subsequent legislation which the Court mentions as having failed of passage, S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess., was not legislation to provide judicial review, but to afford an independent judicial remedy similar to § 9.[5] Thus it is apparent that the alternative that was presented to Congress and rejected clearly enough was not ordinary judicial review of determinations under § 32 (a), but independent judicial action of a sort comparable to § 9's.

The Court does not demonstrate any policy on which Congress may have been acting and from which it might be inferred that judicial review was impliedly precluded under § 32. Congress clearly precluded independent lawsuits, but there is no demonstration that it acted in pursuance of any purpose which would be broad enough impliedly to negate judicial review of administrative action as well. So there is no reason why the general principle should not apply: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon* v. *Brucker*, *supra*, at 581–582.

[5] This legislation seems to have contemplated a judicial remedy much broader than that of the early provisions before the addition of § 32, see note 4, *supra*. The bills covered "any person eligible for a return under this section" (§ 32) and provided that such a person, after filing a notice of claim, might "institute a suit in equity to recover such money or other property in the manner provided by subsection 9 (a) hereof and with like effect."

There is then clearly established jurisdiction to review under the general principles which find expression in § 10 of the Administrative Procedure Act; the statute does not "preclude judicial review." 60 Stat. 243, 5 U. S. C. § 1009. But the Court also holds that, within the meaning of § 10, "agency action is by law committed to agency discretion." Since want of jurisdiction in the District Court is found, I take it the Court holds that the question, review of which is now sought, which is an issue of statutory construction, is totally and exclusively for the administrative officers to determine—not simply that the courts are to give their determination of this question of law considerable weight. Cf. *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130; *Gray* v. *Powell*, 314 U. S. 402, 411. Once it is established that the statute does not preclude judicial review, this conclusion seems to me untenable. The issue is a question of law; the construction of a detailed and moderately specified standard. It is not like the ultimate determination that the return be "in the interest of the United States," § 32 (a)(5), which is clearly where the ultimate reservoir of discretion lies under § 32 (a). This determination was never reached. We need not speculate about the breadth of judicial inquiry in judicial review where the administrative decision not to return the property is based on that ground, or is based on one of the other grounds under the statute. The quantum of review can be adjusted to the problem before the courts. Here the determination not to return was based on a holding that petitioner did not come within the first proviso to § 32 (a)(2)(D). The proviso's terms were viewed administratively not as guides to an administrative discretion but as legal standards. Under commonplace principles, the determination must stand or fall on that basis. It may be that the novelty of the standards of that proviso (see Subcommittee Hearings, Senate Committee on the Judiciary, on S. 2378 and

S. 2039, 79th Cong., 2d Sess., p. 19) should teach the courts to give considerable weight to the administrative construction of the law. But that is not to say, as the Court does, that it is so much a matter of administrative discretion as to preclude judicial review.[6] To my mind, *McGrath* v. *Kristensen*, 340 U. S. 162, is squarely in point. There there was a statute which bristled with discretion as much as this one. But where the administrative decision under it was not rendered on the basis for the exercise of discretion the statute provided, but as a matter of law, judicial review was available. We retreat from established principles of administrative law when we say it is unavailable here. The judgment of the Court of Appeals should be reversed, and the order of the District Court declining to dismiss the complaint for want of jurisdiction should be affirmed.

[6] One of the grounds on which the administrative officials may decline return under § 32 (a) is that the claimant was not the owner of the property at the time it was vested, or the successor thereof. § 32 (a)(1). Is this simply to be deemed a guide to the administrative discretion in granting returns, or a legal standard?